CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, February 22, 2006

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF MACHINES FOR PRODUCING METAL-COATED GLASS DISCS CONTAINING DIGITALLY-ENCODED DATA

AGENCY: U. S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letters and treatment relating to tariff classification of machines for producing metal-coated glass discs containing digitally-encoded data.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP intends to revoke three rulings relating to the classification of machines for producing metal-coated glass discs containing digitally-encoded data under the Harmonized Tariff Schedule of the United States (HTSUS), and to revoke any treat-

ment CBP has previously accorded to substantially identical transactions. These are machines that utilize a laser transfer process to produce metal-coated discs encoded with data. These discs will be further processed into master discs which will then be used to mass-produce compact discs (CDs). CBP invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before April 7, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification and Marking Branch (202) 572–8779.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke three rulings relating to the tariff classification of machines for producing metal-coated

glass discs containing digitally-encoded data. Although in this notice CBP is specifically referring to three rulings, HQ 962939, HQ 962354 and HQ 963997, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones listed. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment it previously accorded to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 962939, dated July 8, 1999, a device referred to variously as a laser transfer machine, laser beam recorder, or code cutter, an ion-type laser which encodes data in digital format onto a photoresist coating of a glass substrate was found to be classifiable as other optical appliances and instruments, not specified or included elsewhere, in subheading 9013.80.90, HTSUS. HQ 962939 is set forth as "Attachment A" to this document. HQ 962354, dated July 23, 1999, classified the Sony Lean Integrated Mastering System High Density (SLIM-HD) similarly. The SLIM-HD consisted of several components, including a laser beam code cutter, within a glass enclosure, which HQ 962354 considered a composite good under General Rule of Interpretation 3(b), HTSUS, with the code cutter imparting the essential character to the whole. HQ 962354 is set forth as "Attachment B" to this document. Finally, HQ 963997, dated April 13, 2001, the AM 100 Automatic Mastering System, said to be similar in all material respects to the merchandise in HQ 962354, was found to be classifiable in subheading 9013.80.90, HTSUS. HQ 963997 is set forth as "Attachment C" to this document.

It is now CBP's position that laser transfer machines, laser beam recorders or code cutters are classifiable in subheading 9010.50.60, HTSUS, as other apparatus and equipment for photographic laboratories. This classification will apply only to mastering equipment incorporating laser beam recorders which encode digitally-formatted data onto the photoresist coating of the glass substrates. Pursuant to 19 U.S.C. 1625(c)(1)), CBP intends to revoke HQ 962939, HQ 962354 and HQ 963997 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the

analysis in HQ 967965, HQ 967966 and HQ 967967, which are set forth as "Attachment D," "Attachment E," and "Attachment F" to this document, respectively. However, HQ 962354 and HQ 963997 are protest review decisions. Therefore, while the proposed revocations will affect the legal principles in those decisions, the liquidation or reliquidation of the underlying entries remains undisturbed.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: February 17, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 962939
JULY 8, 1999
CLA–2 RR:CR:GC 962939 JAS
CATEGORY: Classification
TARIFF NO.: 9013.80.90

MARK NEVILLE
KPMG PEAT MARWICK LLP
345 Park Avenue
New York, NY 10154

RE: Laser Transfer Machine, Laser Beam Recorder; Encoder for Imparting Digital Information onto Metal Coated Glass Discs; Digital Video Disc (DVD) Production Equipment; HQ 961210

DEAR MR. NEVILLE:

In HQ 961210, dated April 2, 1999, issued to you on behalf of Panasonic Disc Services Corporation, we addressed the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of numerous machines for producing digital video discs (DVDs). Among those was a laser transfer machine or encoder which, together with other machines, comprised an in-line mastering system that produces encoded nickel discs called stampers, as an intermediate step in DVD production.

As required by section 177.2(b)(2)(ii) of the Customs Regulations, requests for classification rulings under the Harmonized Tariff Schedule of the United States should include, among other things, a full and complete description of the article. Section 177.8(a)(3) of the Customs Regulations states

that ruling letters shall be based on the information set forth in the ruling request, and section 177.9(b)(1) states, in part, that ruling letters are issued on the assumption that all of the information furnished and incorporated therein, either directly, by reference, or by implication, is accurate and complete in every material respect.

As expressed in HQ 961210, the classification of the laser transfer machine in subheading 8479.89.97, HTSUS, as a machine or mechanical appliance, not specified or included elsewhere in Chapter 84, is correct on the facts presented. However, we have since received additional information about laser transfer machines which indicates that though some mechanical operation may be involved, the machine does not possess significant mechanical features. Our review of laser transfer machines or encoders in general compels us to consider provisions of Chapter 90. For this reason, the classification expressed in HQ 961210 for the laser transfer machine no longer represents Customs position in the matter.

FACTS:

The laser transfer machine, also referred to as a laser beam recorder or laser encoder, is one component of an in-line mastering system, a subgrouping of machines in the mastering line which produce glass discs called "masters." In operation, a glass disc is brush-cleaned, spray rinsed, and dried, coated with light-sensitive photoresist material, and oven baked. The glass disc is then converted into a recorded "master" utilizing the machine in issue here, the laser transfer machine. As described in HQ 961210, the components of the in-line mastering system were within a glass or hard plastic enclosure. While operating with these components, the laser transfer machine is not within this enclosure and, therefore, must be separately classified.

Laser transfer machines, sometimes referred to in the industry as code "cutters," consist of a laser, a signal processor, an optical modulator, recording optics, and a turning and sledding mechanism. The ion-type laser uses argon or krypton gas on a 413 nm wavelength to encode data in digital format onto the photoresist coating of the glass substrate. The signal processor converts the digital source data to the appropriate compact disc format and sends this data to the Acoustic-Optic Modulator (AOM). The AOM transforms the laser's continuous wave into a pulsed beam which exposes a pattern in the photoresist-coated glass that represents the digitally-formatted information. The recording optics direct the beam through a series of optical lenses that reduce the laser beam's diameter to the appropriate size to make the pits. Finally, the turning and sledding mechanism moves the glass disc into and out of position under the laser and spins the disc during the pit forming operation.

The provisions under consideration are as follows:

8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in [chapter 84]; parts thereof:
8479.89	Other:
8479.89.85	. . . machines for the manufacturing of video laser discs
8479.89.97	Other

* * * *

9013	. . . lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in [chapter 90]. . . :
9013.20.00	Lasers, other than laser diodes
9013.80	Other devices, appliances and instruments:
9013.80.90	Other

ISSUE:

Whether the laser transfer machine or encoder is provided for in heading 9013.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Chapter 90, Additional U.S. Rule of Interpretation 3, HTSUS, states in part that for purposes of Chapter 90 the terms "optical appliances" and "optical instruments" refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose. In HQ 956839, dated March 28, 1996, in considering the classification of an ADP input/output unit, imported with an optical scanner, we stated that devices incorporating one or more optical elements and significant electrical or mechanical features were not intended to be classified as optical instruments or appliances within Chapter 90. Cited were a number of other rulings classifying devices containing optical components in provisions outside Chapter 90. The optics in those devices were considered "subsidiary" for tariff classification purposes.

The laser transfer machine in issue consists of the laser, recording optics which, in the main, are optical lenses and prisms, and the AOM which alters the laser's beam optically. The signal processor, which adapts the digital source data in order to adapt it for further use, is an electrical static converter, while the turning and sledding mechanism is a mechanical positioning device. The argon or krypton gas laser is the component which exposes grooves into the photoresist on the glass discs which represent the actual digital information the finished DVD will play. This digital information is the DVD's *raison d'etre*. The very name of the machine, *laser* transfer machine, highlights the significance of the laser. The other optical components augment or facilitate the function of the laser.

In concert with HQ 956839, it is our opinion that the laser transfer machine in issue is an optical appliance or instrument which does not contain significant electrical or mechanical features, and in which the optics clearly are not subsidiary. In reaching this decision, we recognize that numerous apparatus that incorporate lasers and/or other optical elements are not classified as optical instruments or appliances in Chapter 90 because they pos-

sess "significant electrical or mechanical features." Therefore, this decision relates only to the classification of laser transfer machines, as described. It is not authority for classifying other instruments and appliances that contain optical components.

HOLDING:

Under the authority of GRI 1, HTSUS, the laser transfer machine, laser beam recorder, or encoder is provided for in heading 9013. It is classifiable in subheading 9013.80.90, HTSUS.

Under the authority of section 177.8(a)(2) of the Customs Regulations, Panasonic Disc Services Corporation, or its representative, shall ascertain that copies of HQ 961210 and HQ 962939 are attached to the documents filed with the appropriate Customs Service office in connection with any Customs transaction to which they apply.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 962354
CLA–2 RR:CR:GC 962354 JAS
CATEGORY: Classification
TARIFF NO.: 9013.80.90

PORT DIRECTOR OF CUSTOMS
300 S. Ferry Street
Terminal Island, CA 90731

RE: Protest 2704–98–101887; Sony Lean Integrated Mastering System; Machinery for Making Glass Master Discs

DEAR PORT DIRECTOR:

This is our decision on Protest 2704–98–101887, filed against your classification under the Harmonized Tariff Schedule of the United States (HTSUS), of the Sony Lean Integrated Mastering System-High Density (SLIM-HD), machinery for making metallized glass disc substrates. These discs, in turn, are used to make metal master discs called stampers, for use in the mass replication of compact discs (CDs) and digital video discs (DVDs). The entry under protest was liquidated on July 17, 1998, and this protest timely filed on September 25, 1998.

FACTS:

The SLIM-HD is an in-line system consisting of four (4) components or machines that produce digitally-encoded metal coated glass discs that will be further processed into master discs called stampers. In sequence, a recycle cleaning component removes particles of nickel and excess recording media called photoresist from glass master discs previously produced by the

SLIM-HD; another component then polishes the surface of each glass disc, coats the surface with a photoresist material, and cures the disc by baking it on a hot plate; a high density laser beam code "cutter" then utilizes a krypton or argon laser beam to burn or expose a pattern in the photoresist; and finally, a component both chemically removes the exposed portions of the photoresist to produce "pits," which represent the digital data in the photoresist, separated by sections called "lands," and also applies a thin layer of conductive nickel over the disc, in a process the industry calls sputtering. All four components of the SLIM-HD in issue are within a single glass or hard plastic enclosure designed to create positive air pressure within. This protects the operations from dirt and other outside contaminants. In subsequent operations performed by machines that are not a part of this protest, metal stampers are produced that contain the requisite digital pattern. The glass portion will be separated from the metal stamper and may be returned to the recycle cleaning machine.

The SLIM-HD was entered under a provision in HTSUS 9017, for drawing or marking-out instruments. The import specialist determined that the SLIM-HD was a composite machine under Section XVI, Note 3, HTSUS, and concluded the principal function of producing metallized glass disc substrates was not specifically described by any 4-digit heading in the HTSUS. The entry was therefore liquidated under a provision of HTSUS heading 8479, as other machine or mechanical apparatus.

The protestant now contends that the SLIM-HD is a composite good, under General Rule of Interpretation (GRI) 3(b), HTSUS, which must be classified according to it's essential character. In this case, protestant claims the essential character is imparted by the laser beam code cutter because it is the component that represents a majority of the value of the entire system and consumes more than twice the process time of any other component. Protestant asserts this component is provided for in HTSUS heading 9010, as other apparatus and equipment for photographic laboratories, on the basis that laser beam code cutters perform a "photographic" process for purposes of heading 9010. Protestant cites judicial and administrative opinions which, he claims, support the claim under heading 9010. We agree with protestant as to the significance of the laser beam code cutter but, as will be discussed later in this decision, we disagree on its classification.

The HTSUS provisions under consideration are as follows:

8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in [chapter 84]; parts thereof:
	Other machines and mechanical appliances:
8479.89.97	Other
*	* * *
9010	Apparatus and equipment for photographic laboratories . . . , not specified or included elsewhere in [Chapter 90] . . . :
9010.50	Other apparatus and equipment for photographic . . . laboratories . . . :
9010.50.60	Other

* * * *

9013 . . . other optical appliances and instruments, not specified or included elsewhere in [chapter 90] . . . :

9013.80 Other devices, appliances and instruments:

9013.80.90 Other

ISSUE:

Whether the SLIM-HD is a composite machine, as defined in Section XVI, Note 3, HTSUS; whether it is a composite good, as defined in GRI 3(b), HTSUS; whether the laser beam code cutter component is classified in heading 9010, or in another provision of Chapter 90.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b), HTSUS, states, in part, that composite goods consisting of different components shall be classified as if consisting of that component which gives the good its essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Section XVI, Note 1(m), HTSUS, excludes articles of Chapter 90. Therefore, if the SLIM-HD is a good of heading 9010, or any other heading in Chapter 90, it cannot be classified in heading 8479. Relevant ENs at p. 4 state that for purposes of Rule 3 composite goods include, among other things, individual components attached to each other to form a practically inseparable whole, that are adapted one to the other and are mutually complementary, and together they form a whole which would not normally be offered for sale in separate parts. The SLIM-HD conforms to this description. As previously stated, we agree with protestant that the SLIM-HD is a composite good under GRI 3(b), which must be classified according to the laser beam coder cutter component which imparts the essential character to the whole. It is the classification of this component that is now in issue.

Laser beam code cutters, or laser transfer machines or encoders, as they are sometimes referred to in the industry, consist of a laser, a signal processor, an optical modulator, recording optics, and a turning and sledding mechanism. The ion-type laser uses argon or krypton gas on a 413 nm wavelength to encode data in digital format onto the photoresist coating of the glass substrate. The signal processor converts the digital source data to the appropriate compact disc format and sends this data to the Acoustic-Optic Modulator (AOM). The AOM transforms the laser's continuous wave into a pulsed beam which exposes a pattern in the photoresist-coated glass that represents the digitally-formatted information. The recording optics direct

the beam through a series of optical lenses that reduce the laser beam's diameter to the appropriate size to make the pits. Finally, the turning and sledding mechanism moves the glass disc into and out of position under the laser and spins the disc during the pit forming operation.

Protestant cites one judicial decision and two Headquarters rulings to support the claim that the code cutter performs a "photographic" function for purposes of heading 9010. In QMS, Inc. v. United States, 19 CIT 551 (1995), color ink sheet rolls for use in thermal transfer printers were found to be classified in HTSUS heading 3702 as photographic film in rolls, on the basis of the Court's broad interpretation of the term "photographic" as including a "process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces." In the present case, the Court's conclusions are at best dictum, because the merchandise and tariff provisions were different. There was no discussion either of heading 9010, or the scope of term "laboratories" in that heading. HQ 083123, dated December 18, 1989, held that subheading 9010.20.60, HTSUS, other apparatus for photographic laboratories, was sufficiently broad to encompass machines for developing presensitized aluminum printing plates. The ruling stated "Although the word 'laboratory' does limit heading 9010 to some extent, it is sufficiently broad to encompass the instant developing apparatus." This ruling concedes limitations on heading 9010 but does not explain the extent of those limitations. For this reason, and because it classifies merchandise with no demonstrated similarity to a laser beam code cutter, HQ 083123 is not authority for classifying this component. Finally, protestant cites HQ 087315, dated September 10, 1991, for the proposition that if a photoresist material is classifiable in heading 3707, as a chemical preparation for photographic uses, then the machines which use the photoresist must perform a "photographic" function. A laser beam code cutter neither applies the photoresist nor uses the photoresist; the laser beam code cutter acts on the photoresist. In our opinion, there is no demonstrated similarity between the legal notes and tariff provisions in HQ 087315 and those in this case, so that the cited ruling is of little probative value here.

In HQ 962939, dated July 8, 1999, laser beam code cutters or laser transfer machines were held to be classifiable in subheading 9013.80.90, HTSUS, as other optical appliances or instruments. The principles of HQ 962939, and decisions cited, are incorporated by reference in this decision. In concert with HQ 956839, dated March 28, 1996, which HQ 962939 cited with approval, it is our opinion that the laser beam code cutter or laser transfer machine is an optical appliance or instrument which does not contain significant electrical or mechanical features, and in which the optics clearly are not subsidiary. Laser beam code cutters or laser transfer machines are classifiable in subheading 9013.80.90, HTSUS.

In reaching this decision, we recognize that numerous apparatus that incorporate lasers, laser beam code cutters, and/or other optical elements may not be classified as optical instruments or appliances in Chapter 90 because they possess "significant electrical or mechanical features." Therefore, this decision relates only to the classification of the SLIM-HD. It is not authority for classifying other instruments and appliances that contain optical components.

HOLDING:

Under the authority of GRI 3(b), HTSUS, the SLIM-HD is provided for in heading 9013. It is classifiable in subheading 9013.80.90, HTSUS. Because the rate of duty under this provision is more than the liquidated rate, you should reclassify the SLIM-HD as indicated, and DENY the protest.

In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.gov, by means of the Freedom of Information Act, and other methods of public distribution.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 963997
APRIL 13, 2001
CLA–2 RR:CR:GC 963997 JAS
CATEGORY: Classification
TARIFF NO.: 9013.80.90

PORT DIRECTOR OF CUSTOMS
300 S. Ferry Street
Terminal Island, CA 90731

RE: Protest 2704–99–102674; Automatic Mastering System

DEAR PORT DIRECTOR:

This is our decision on Protest 2704–99–102674, filed against your classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of an automatic master recording or mastering system. The entry under protest was liquidated on July 2, 1999, and this protest timely filed on September 29, 1999. The entry under protest also includes a compact disc replicating machine for making digital video discs (DVDs) from master discs called "stampers." The classification of this replicating machine is not at issue here.

Counsel for the protestant presented additional facts and legal arguments at a meeting in our office on January 30, 2001. These were confirmed in submissions, dated March 19 and April 11, 2001.

FACTS:

The merchandise under protest is the AM 100 Automatic Mastering System (the AM 100), a series of machines or components used to produce

metal-coated glass discs containing digitally-encoded audio data. These discs will be further processed by separate machines into master discs called "stampers." Stampers are then used in a separate process to mass-produce compact discs (CDs). The AM 100 essentially cleans and polishes the glass disc substrates, coats the surface with a chemical photoresist and cures the disc. A laser beam recorder, a machine utilizing a high density laser beam, then burns a pattern of digital data in the photoresist using input from U-matic, CD and 8 mm Exabyte data tapes. Finally, another component chemically removes exposed portions of the photoresist to produce so-called "pits" and "lands," which represent the digital data in the photoresist, then applies a thin conductive coating of nickel over the disc, in a process called "sputtering." A programmable personal computer which monitors all process parameters using appropriate software is housed separately from but connected electrically to the AM 100. Except for the programmable PC, all of the components that comprise the AM 100 are within the same housing. This merchandise is similar in all material respects to in-line mastering systems of the type described in HQ 962354, dated July 23, 1999.

The AM 100 was entered under a provision of heading 8520, HTSUS, for other sound recording apparatus. The entry was liquidated, however, under a provision of heading 8479, HTSUS, for machines and mechanical appliances not specified or included elsewhere in Chapter 84. In a memorandum supporting this protest, dated September 29, 1999, and in its submission of March 19, 2001, counsel for the protestant makes the following arguments in favor of the heading 8520 classification: the AM 100 is a composite machine under Section XVI, Note 3, HTSUS, the principal function of which, to produce pits in the surface of the photoresist-coated glass substrate by the laser beam encoder, is sound recording under that heading; because heading 8520 includes all sound recording devices whatever the intended purpose, the laser beam method is advanced technology substantially similar to groove type recording apparatus classified in heading 8520; this technology is recognized by a statistical breakout under subheading 8520.90.00 for optical disc recorders. Alternatively, counsel maintains the AM 100 is a functional unit under Section XVI, Note 4, HTSUS, and that heading 8520 is appropriate to the function it performs. In its March 19, 2001 submission, counsel reiterates the heading 8520 claim and makes an alternative claim under heading 8471, as automatic data processing machines and units thereof. Specifically, counsel contends that the AM 100 is a machine for transcribing data onto data media in coded form and which processes such data.

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof; . . . machines for transcribing data onto data media in coded form and machines for processing such data
*	* * *
8479	Machines and mechanical appliances, having individual functions, not specified or included elsewhere in [chapter 84]:
	Other machines and mechanical appliances:
8479.89.97	Other

*	*	*	*
8520	. . . other sound recording apparatus, whether or not incorporating a sound reproducing device:		
8520.90.0	Other		
*	*	*	*
9013	. . . lasers . . . ; other optical appliances and instruments, not specified or included elsewhere in [chapter 90]:		
9013.80	Other devices, appliances and instruments:		
9013.80.90	Other		

ISSUE:

Whether AM 100 is a composite machine or a functional unit under Section XVI, Notes 3 or 4; whether it is a composite good under GRI 3.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b) states in part that composite goods made up of different components shall be classified as if consisting of the component which gives the goods their essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Section XVI, Note 1(m), HTSUS, excludes articles of Chapter 90, HTSUS. So, if the AM 100 is classified in any heading of that chapter, it cannot be classified in heading 8520 or in heading 8471, as counsel claims. In HQ 962939, dated July 8, 1999, laser transfer machines or encoders - one component of a mastering system - were found to be classifiable as other optical appliances and instruments, in subheading 9013.80.90, HTSUS. Subsequently, HQ 962354, dated July 23, 1999, held that an in-line mastering system that included a laser transfer machine or encoder, all the components of which were in the same housing, was a composite good under GRI 3(b), with the encoder imparting the essential character. The whole was found to be classifiable in subheading 9013.80.90. The principles of these rulings are incorporated by reference in this decision.

However, we should note that neither of the cited rulings addressed heading 8520. Before proceeding to a discussion of that heading, however, counsel addresses the validity of the heading 9013 classification. The argument is that certain ENs on p. 1600 exclude from heading 9013 lasers which have been adapted to perform quite specific functions by adding ancillary equipment consisting of special devices (e.g., work-tables, work-holders, means of feeding and positioning workpieces, means of observing and checking the progress of the operation, etc.) and which, therefore, are identifiable as working machines, medical apparatus, control apparatus, measuring appa-

ratus, etc. The ENs continue by excluding from heading 9013 machines and appliances incorporating lasers, and state that insofar as their classification is not specified in the Nomenclature, they should be classified with the machines or appliances having a similar function. These ENs clearly apply to lasers incorporated into other devices or to which other components have been added, in either case resulting in a device classifiable in a heading other than 9013. Examples cited in the ENs include machine tools that remove metal by laser (heading 8456); laser soldering, brazing or welding machines and apparatus (8515); and, laser apparatus specially used for medical purposes (9018). In our opinion, these ENs address only the issue of why lasers to which other devices are attached cannot be classified as *lasers.* The cited rulings classified laser transfer machines and mastering systems incorporating laser transfer machines not as lasers, but as other optical appliances or instruments, not specified or included elsewhere. Moreover, in this case, in addition to the laser, the AM 100 mastering system includes significant additional optical elements, i.e., the AOM or acoustic optic modulator which transforms the laser beam into pulses and the recording optics which direct the laser beam through optical lenses - which are optical elements described by heading 9001 - to reduce the laser beam's diameter to the appropriate size. In our opinion, these ENs do not describe automatic mastering systems and, thus, do not serve as authority to eliminate them from heading 9013.

Counsel's bases its heading 8520 claim on Section XVI, Note 3 and Note 4, HTSUS, on the basis that the function which the AM 100 System performs being to record sound in digital format; alternatively, under GRI 3(a), HTSUS, heading 8520 provides a more specific description for the AM 100 than does heading 9013. Section XVI, Note 1(m), HTSUS, notwithstanding, the ENs on p. 1481 define the term "sound recording apparatus" as apparatus which, on receiving a suitable audio-frequency vibration generated by a sound-wave, so modifies a recording medium as to enable it to be used subsequently to reproduce the original sound-wave. Broadly speaking, a sound recording apparatus comprises a device which modifies the recording medium, and a mechanism which moves this device in relation to the recording medium." Counsel's claim is that the AM 100 uses a laser to create a spiral of pits of predefined depth and width which is an advancement in technology over so-called groove type sound recording apparatus which is among the main types of sound recording apparatus described in the ENs. In this type, a stylus cuts a groove in a recording medium mounted on a support, with the groove varying in form according to the variations recorded. We do not agree that the AM 100 functions as sound recording apparatus of this type. In our opinion, the process involved is one of data transfer of digital information that does not involve the recording of a sound wave. There is no evidence of a sound wave the audio-frequency of which the AM 100 utilizes to modify a recording medium. Also, the digitally-encoded master is used to produce plastic disc-shaped replicas sputter coated with aluminum on one side. The master, itself, can neither be played nor heard on a standard disc player, i.e., it cannot reproduce the original sound wave. Concerning the statistical breakout under subheading 8520.90.00 for optical disc recorders, we note that statistical annotations and other matters formulated under section 484(f), Tariff Act of 1930, as amended (19 U.S.C. 1484(e)), are not part of the Harmonized Tariff Schedule of the United States legal text and, consequently, are not legally binding for classification purposes. See Harmonized

Tariff Schedule of the United States (2001), Preface to the 13th. Edition. Likewise, Customs has recognized that not all devices that incorporate lasers or other optical elements are necessarily classifiable in Chapter 90, because they may possess significant electrical or mechanical features. See HQ 962354, supra. However, in this instance the claim under heading 8520 has not been substantiated.

Counsel's alternative claim is under heading 8471, as machines for transcribing data onto data media in coded form and machines for processing such data. Again, Section XVI, Note 1(m), HTSUS, notwithstanding, the ENs on p. 1407 describe machines of heading 8471 for transcribing data onto data media in coded form. Among the machines described are those that transcribe in code (punched holes, magnetic spot, etc.) the data to be used in subsequent processing operations, and machines for transferring coded information from one type of data medium to another type (e.g., from punched cards to magnetic tape or vice versa) or to transfer it to another medium of the same type. The latter category includes reproducing machines which are used to produce all or part of the data on master cards or tape by making new cards or tape. In our opinion, machinery used to produce metal-coated glass discs containing digitally-encoded audio data possess no demonstrated similarity to the machines described in the cited ENs. For this reason, heading 8471 does not apply.

HOLDING:

Under the authority of GRI 1, the AM 100 Automatic Mastering System is provided for in heading 9013. It is classifiable in subheading 9013.80.90, HTSUS.

The protest should be DENIED. In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.gov, by means of the Freedom of Information Act, and other methods of public distribution.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967965
CLA–2 RR:CR:GC 967965 JAS
CATEGORY: Classification
TARIFF NO.: 9010.50.60

JOHN B. BREW, ESQ.
COLLIER, SHANNON SCOTT PLLC
3050 K Street NW
Washington, D.C. 20007–5108

RE: Automatic Mastering System; HQ 963997 Revoked

DEAR MR. BREW:

In HQ 963997, dated April 13, 2001, the AM 100 Automatic Mastering System, machinery for making metal-coated glass discs containing digitally-encoded data, was held to be classifiable in subheading 9013.80.90, Harmonized Tariff Schedule of the United States (HTSUS), as other optical appliances and instruments, not specified or included elsewhere in [chapter 90]. We have reconsidered this classification and now believe that it is incorrect.

However, HQ 963997 represents a decision on a protest you filed with the Port Director, U.S. Customs and Border Protection, Terminal Island, CA., on behalf of ODME Inc., now Toolex USA, Inc. Therefore, the proposed revocation of HQ 963997 will affect the legal principles in that decision but the liquidation or reliquidation of the underlying entries remains undisturbed. See San Francisco Newspaper Printing Co., v. United States, 620 F. Supp. 738 (Ct. Intl. Trade, decided October 18, 1985).

FACTS:

As stated in HQ 963997, the AM 100 Mastering System (the AM 100) is a series of machines or components used to produce metal-coated glass discs containing digitally-encoded audio data. These discs will be further processed by separate machines into master discs called "stampers" which are then used in a separate process to mass-produce compact discs (CDs). The AM 100's description and method of operation, as contained in HQ 963997, are incorporated by reference in this decision. As noted therein, except for a programmable personal computer which controls the AM 100's operations, all of the components that comprise the AM 100 are within the same housing. This merchandise was stated to be similar in all material respects to in-line mastering systems of the type described in HQ 962354, dated July 23, 1999.

In a memorandum of law, dated September 29, 1999, and a submission, dated March 19, 2001, you made a number of factual and legal arguments in support of classification in heading 8520, HTSUS, as other sound recording apparatus. You noted that the laser beam method employed by the AM 100 is advanced technology substantially similar to groove type recording apparatus classified in heading 8520, this technology being recognized by a statistical breakout under subheading 8520.90.00 for optical disc recorders.

HQ 963997 noted, however, that Section XVI, Note 1(m), HTSUS, excludes from that section articles of chapter 90. Therefore, if the AM 100 is provided for in any heading of chapter 90 it is to be classified in that head-

ing. For the reasons that follow, we believe that subheading 9010.50.60, HTSUS, other instruments and apparatus for photographic laboratories represents the correct classification for this merchandise.

The HTSUS provisions under consideration are as follows:

9010	Apparatus and equipment for photographic laboratories . . . , not specified or included elsewhere in [Chapter 90] . . . :
9010.50	Other apparatus and equipment for phographic . . . laboratories . . . :
9010.50.60	Other
*	* * *
9013	[l]asers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in [chapter 90]; parts and accessories thereof:
9013.20.00	Lasers, other than laser diodes
9013.80	Other devices, appliances and instruments:
9013.80.90	Other

ISSUE:

Whether the AM 100 is provided for in heading 9010, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b), HTSUS, states, in part, that composite goods consisting of different components shall be classified as if consisting of that component which gives the good its essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

We reiterate the finding in HQ 963997 that the AM 100 is a composite good under GRI 3(b) and that the laser beam recorder imparts the essential character to the whole. HQ 963997 concluded that the AM 100 was classifiable in subheading 9013.80.90, HTSUS, as other optical appliances and instruments, not specified or included in [chapter 90]. However, inasmuch as heading 9013 covers optical appliances and instruments not covered more specifically by another heading in chapter 90, the possible applicability of subheading 9010.50.60, HTSUS, other apparatus and equipment for photographic laboratories, must now be considered, with the focus being on whether the laser beam code cutter component of the AM 100 performs a "photographic" process for purposes of heading 9010.

In a different context, in QMS, Inc. v. United States, 19 CIT 551 (1995), on color ink sheet rolls for use in thermal transfer printers, the Court stated its broad interpretation of the term "photographic" as including a "process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces." Also, HQ 083123, dated December 18, 1989, examined the dictionary definition of the term "laboratory" for heading 9010 purposes, and accorded the term a broad interpretation. We do not necessarily view these references as controlling, but we do find them to be instructive.

The 9010 heading text includes as apparatus and equipment for photographic laboratories apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials. The ENs for heading 9010, under (N), describe apparatus used to manufacture electronic integrated circuits, those used to expose circuit patterns onto a sensitized layer which has been applied to the surface of the semiconductor wafer. Direct write-on-wafer apparatus is among the types included. These use an automatic data processing (ADP) machine controlled "writing beam" (such as an electron beam (E-beam), ion beam or laser) to draw the circuit design directly on the sensitized layer, which has been applied to the surface of the semiconductor wafer, after the co-ordinate system of the apparatus has been properly aligned on the underlying patterns of the wafer. The EN under (N) ends with "All these apparatus produce the same end result. That is, an exposure pattern which matches the desired circuit pattern and which is produced on a sensitized material which can be developed much as a photographic film is developed."

Thus, consideration must be given to whether using a laser to expose patterns in the light-sensitive photoresist layer on a glass disc substrate raises a latent image in the photoresist so as to be considered a "photographic" process. The evidence indicates that focusing the laser's beam on the photoresist layer develops the digitally encoded data in the photoresist in a process that exposes the pattern as a latent image. Inasmuch as direct write-on-wafer apparatus, as described, is considered "photographic" for heading 9010 purposes, and functions in substantially the same manner as the laser beam recorder under consideration here, the laser beam recorder is likewise to be considered as performing a "photographic" process for heading 9010 purposes. Such a conclusion eliminates heading 9013 from consideration. This decision will apply only to mastering equipment incorporating laser beam recorders which encode digitally-formatted data onto the photoresist coating of the glass substrates.

HOLDING:

Under the authority of GRI 3(b), HTSUS, the AM 100 is to be classified as if consisting of the laser beam recorder which is provided for in heading 9010. The AM 100 is classifiable as other apparatus and equipment for photographic laboratories in subheading 9010.50.60, HTSUS.

EFFECT ON OTHER RULINGS:

HQ 963997, dated April 13, 2001, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967966
CLA–2 RR:CR:GC 967966 JAS
CATEGORY: Classification
TARIFF NO.: 9010.50.60

LEE SILBERZAHN,
SENIOR TRADE SPECIALIST
SONY ELECTRONICS INC.
123 Tice Boulevard
Woodcliff Lake, New Jersey 07675

RE: Sony Lean Integrated Mastering System; HQ 962354 Revoked

DEAR MR. SILBERZAHN:

In HQ 962354, dated July 23, 1999, the Sony Lean Integrated Mastering System-High Density (SLIM-HD), machinery for making metallized glass disc substrates, was held to be classifiable in subheading 9013.80.90, Harmonized Tariff Schedule of the United States (HTSUS), as other optical appliances and instruments, not specified or included elsewhere in [chapter 90]. We have reconsidered this classification and now believe that it is incorrect.

However, HQ 962354 represents a decision on a protest filed with the Port Director, U.S. Customs and Border Protection, Terminal Island, CA. Therefore, the proposed revocation of HQ 962354 will affect the legal principles in that decision but the liquidation or reliquidation of the underlying entries remains undisturbed. See San Francisco Newspaper Printing Co., v. United States, 620 F. Supp. 738 (Ct. Intl. Trade, decided October 18, 1985).

FACTS:

As stated in HQ 962354, the SLIM-HD is an in-line system consisting of four (4) components or machines that produce digitally-encoded metal coated glass discs that will be further processed into master discs called stampers. In a separate process, stampers are then used to mass-produce compact discs (CDs) and digital video discs (DVDs). The four components that comprise the SLIM-HD are within a glass or hard plastic enclosure to create positive air pressure and to eliminate dirt and other contaminants. One of the components in the SLIM-HD is a high density laser beam code "cutter" which utilizes a krypton or argon laser beam to burn or expose a pattern in a recording media or photoresist applied as a coating onto the glass disc substrate. It is this component on which we will focus. The description of the SLIM-HD and its method of operation, as stated in HQ 962354, are incorporated by reference in this decision.

The HTSUS provisions under consideration are as follows:

9010 Apparatus and equipment for photographic laboratories . . . , not specified or included elsewhere in [Chapter 90] . . . :

9010.50 Other apparatus and equipment for phographic . . . laboratories . . . :

9010.50.60	Other
*	* * *
9013	[l]asers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in [chapter 90]; parts and accessories thereof:
9013.20.00	Lasers, other than laser diodes
9013.80	Other devices, appliances and instruments:
9013.80.90	Other

ISSUE:

Whether the laser beam code cutter component of the SLIM-HD is classified in heading 9010, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b), HTSUS, states, in part, that composite goods consisting of different components shall be classified as if consisting of that component which gives the good its essential character.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant ENs state that for purposes of GRI 3 composite goods include, among other things, individual components attached to each other to form a practically inseparable whole, that are adapted one to the other and are mutually complementary, and together they form a whole which would not normally be offered for sale in separate parts. The SLIM-HD conforms to this description.

In letters dated June 11, 1998, and June 22, 1999, submitted in connection with the decision in HQ 962354, you argued that the SLIM-HD was a composite good under GRI 3(b), HTSUS, and that the laser beam code cutter imparted the essential character to the whole. You asserted classification in subheading 9010.50.60, HTSUS, as other apparatus and equipment for photographic laboratories, on the basis that laser beam code cutters perform a "photographic" process for purposes of heading 9010.

As previously stated, we agree that the SLIM-HD is a composite good under GRI 3(b), and that the laser beam code cutter component imparts the essential character to the whole. We have thoroughly reviewed your arguments in support of classification in subheading 9010.50.60, HTSUS, and now find them to be compelling. Among those is your reference to QMS, Inc. v. United States, 19 CIT 551 (1995), on color ink sheet rolls for use in thermal transfer printers, where the Court stated its broad interpretation of the

term "photographic" as including a "process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces." Also referenced was HQ 083123, dated December 18, 1989, which examined the dictionary definition of the term "laboratory" for heading 9010 purposes, and accorded the term a broad interpretation. We do not necessarily view these references as controlling, but we do find them to be instructive.

By its terms, heading 9013 does not include optical appliances and instruments that are specified or included elsewhere in chapter 90. The 9010 heading text includes as apparatus and equipment for photographic laboratories apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials. The ENs for heading 9010, under (N), describe apparatus used to manufacture electronic integrated circuits, those used to expose circuit patterns onto a sensitized layer which has been applied to the surface of the semiconductor wafer. Direct write-on-wafer apparatus is among the types included. These use an automatic data processing (ADP) machine controlled "writing beam" (such as an electron beam (E-beam), ion beam or laser) to draw the circuit design directly on the sensitized layer, which has been applied to the surface of the semiconductor wafer, after the co-ordinate system of the apparatus has been properly aligned on the underlying patterns of the wafer. The EN under (N) ends with "All these apparatus produce the same end result. That is, an exposure pattern which matches the desired circuit pattern and which is produced on a sensitized material which can be developed much as a photographic film is developed."

Thus, consideration must be given to whether using a laser to expose patterns in the light-sensitive photoresist layer on a glass disc substrate raises a latent image in the photoresist so as to be considered a "photographic" process. The evidence indicates that focusing the laser's beam on the photoresist layer develops the digitally encoded data in the photoresist in a process that exposes the pattern as a latent image. Inasmuch as direct write-on-wafer apparatus, as described, is considered "photographic" for heading 9010 purposes, and functions in substantially the same manner as the laser beam recorder under consideration here, the laser beam recorder is likewise considered as performing a "photographic" process for heading 9010 purposes. Such a conclusion eliminates heading 9013 from consideration. This decision will apply only to mastering equipment incorporating laser beam recorders which encode digitally-formatted data onto the photoresist coating of the glass substrates.

HOLDING:

Under the authority of GRI 3(b), HTSUS, the SLIM-HD is provided for in heading 9010. It is classifiable as other apparatus and equipment for photographic laboratories in subheading 9010.50.60, HTSUS.

EFFECT ON OTHER RULINGS:

HQ 962354, dated July 23, 1999, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967967
CLA–2 RR:CR:GC 967967 JAS
CATEGORY: Classification
TARIFF NO.: 9010.50.60

MARK NEVILLE
KPMG PEAT MARWICK LLP
345 Park Avenue
New York, NY 10154

RE: Laser Beam Recorder, HQ 962939 Revoked

DEAR MR. NEVILLE:

In HQ 962939, dated July 8, 1999, issued to you on behalf of Panasonic Disc Services Corporation, a laser beam recorder or laser transfer machine was found to be classifiable in subheading 9013.80.90, Harmonized Tariff Schedule of the United States (HTSUS), as other optical instruments and apparatus, not specified or included elsewhere in [chapter 90]. We have reconsidered this classification and now believe that it is incorrect.

FACTS:

As stated in HQ 962939, the laser beam recorder, together with other machines, comprised an in-line mastering system that produces encoded nickel discs called stampers, as an intermediate step in digital versatile disc (DVD) production. The laser beam recorder, also referred to as a laser transfer machine or laser encoder, is one component of an in-line mastering system, a subgrouping of machines in the mastering line which produce glass discs called "masters." The description of the in-line mastering system and its method of operation, as stated in HQ 962939, are incorporated by reference in this decision. Our focus will be on the laser beam recorder which is separately classifiable.

The laser beam recorders in HQ 962939 consist of a laser, a signal processor, an optical modulator, recording optics, and a turning and sledding mechanism. The ion-type laser uses argon or krypton gas on a 413 nm wavelength to encode data in digital format onto the photoresist coating of the glass substrate. The signal processor converts the digital source data to the appropriate compact disc format and sends this data to the Acoustic-Optic Modulator (AOM). The AOM transforms the laser's continuous wave into a pulsed beam which exposes a pattern in the photoresist-coated glass that represents the digitally-formatted information. The recording optics direct the beam through a series of optical lenses that reduce the laser beam's diameter to the appropriate size to make the pits. Finally, the turning and sledding mechanism moves the glass disc into and out of position under the laser and spins the disc during the pit forming operation.

The HTSUS provisions under consideration are as follows:

9010	Apparatus and equipment for photographic . . . laboratories . . . , not specified or included elsewhere in [chapter 90]; . . . ; parts and accessories thereof:

9010.50	Other apparatus and equipment for photographic . . . laboratories; . . . :
9010.50.60	Other
*	* * *
9013	[l]asers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in [chapter 90]; parts and accessories thereof:
9013.20.00	Lasers, other than laser diodes
9013.80	Other devices, appliances and instruments:
9013.80.90	Other

ISSUE:

Whether the laser beam recorder is provided for in heading 9010.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the Harmonized System. CBP believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The subheading 9013.80.90, HTSUS, classification HQ 962939 reached was based, in large part, on a finding that the laser beam recorder was within the Chapter 90, Additional U.S. Rule of Interpretation 3, HTSUS, definition of the terms "optical appliances" and "optical instruments." It now appears that subheading 9010.50.60, HTSUS, other apparatus and equipment for photographic laboratories, was not sufficiently considered.

By its terms, heading 9013 does not include optical appliances and instruments that are specified or included elsewhere in chapter 90. The 9010 heading text includes as apparatus and equipment for photographic laboratories apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials. The ENs for heading 9010, under (N), describe apparatus used to manufacture electronic integrated circuits, those used to expose circuit patterns onto a sensitized layer which has been applied to the surface of the semiconductor wafer. Direct write-on-wafer apparatus is among the types included. These use an automatic data processing (ADP) machine controlled "writing beam" (such as an electron beam (E-beam), ion beam or laser) to draw the circuit design directly on the sensitized layer, which has been applied to the surface of the semiconductor wafer, after the co-ordinate system of the apparatus has been properly aligned on the underlying patterns of the wafer. The EN under (N) ends with "All these apparatus produce the same end result. That is, an exposure pattern

which matches the desired circuit pattern and which is produced on a sensitized material which can be developed much as a photographic film is developed."

Thus, consideration must be given to whether using a laser to expose patterns in the light-sensitive photoresist layer on a glass disc substrate raises a latent image in the photoresist so as to be considered a "photographic" process. The evidence indicates that focusing the laser's beam on the photoresist layer develops the digitally encoded data in the photoresist in a process that exposes the pattern as a latent image. In the context of heading 3702, photographic film in rolls, the court stated its broad interpretation of the term "photographic" as including "a process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces." See OMS, Inc. v. United States, 19 CIT 551 (1995). Inasmuch as direct write-on-wafer apparatus, as described, is considered "photographic" for heading 9010 purposes, and functions in substantially the same manner as the laser beam recorder under consideration here, the laser beam recorder is likewise to be considered as performing a "photographic" process for heading 9010 purposes. Such a conclusion eliminates heading 9013 from consideration. This decision will apply only to mastering equipment incorporating laser beam recorders which encode digitally-formatted data onto the photoresist coating of the glass substrates.

HOLDING:

Under the authority of GRI 1, HTSUS, the laser beam recorder, laser transfer machine or encoder is provided for in heading 9010. It is classifiable in subheading 9010.50.60, HTSUS.

EFFECT ON OTHER RULINGS:

HQ 962939, dated July 8, 1999, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 06–22

UNITED STATES OF AMERICA, Plaintiff, v. GOLDEN GATE PETROLEUM CO., Defendant.

Before: Barzilay, Judge
Court No. 03–00005

OPINION

[Plaintiff's motion for summary judgment to recover unpaid duties and interest is granted.]

Dated: February 21, 2006.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*), Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Bruce Neal Stratvert*, (*Marcella Powell*); *Michael Felts*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for the plaintiff.

Collier, Shannon, Scott, PLLC (*Michael D. Sherman*), *Thomas W. Mitchell*, for the defendant.

Barzilay, Judge: Plaintiff, the United States (the "Government"), commenced this action pursuant to 28 U.S.C. § 1582(3) to recover unpaid duties in the amount of $ 1,359,172.50 and accrued interest claimed to be due on one entry made by Defendant at the port of San Francisco, California, on October 8, 1985. The parties have filed cross-motions for summary judgment under USCIT Rule 56. The Government alleges that Defendant is liable for these duties because Customs' liquidation on May 30, 1986, of the underlying entry was final. Defendant denies its liability, claiming that Customs assessed duties against the wrong company and in the wrong amount.

UNCONTESTED FACTS

The central dispute in this case concerns the identity of the importer that should be held liable for the duties on the entry at issue. Defendant, Golden Gate Petroleum Company ("Golden Gate Petro-

leum"), claims that it was not the actual importer for purposes of duty liability and that Golden Gate Petroleum International, Ltd. ("Golden Gate Petroleum Int'l"), Golden Gate Petroleum's subsidiary – not a party[1] to this case – is the liable importer. The evidence presented shows that in the underlying transaction, Golden Gate Petroleum Int'l purchased 225,464 barrels of leaded gasoline for $ 4,966,885.00 from Nichimen Corporation ("Nichimen") in 1985. *Aff. O'Keefe*[2] ¶ 6. Although the initial purchase contract listed "Golden Gate Petroleum Company" as the contracting party, Nichimen invoiced Golden Gate Petroleum Int'l for the purchase of the gasoline, and Golden Gate Petroleum Int'l paid for the merchandise with its loan proceeds from International Bankers Incorporated, S.A. *Aff. O'Keefe*, Ex. 4, Ex. 5. Golden Gate Petroleum Int'l was also the party that chartered the vessel, the M/T Nairi, to transport the purchased gasoline and toluene, bought in Japan, from the Soviet Union and Japan to the United States. *Aff. O'Keefe* ¶ 9. Upon arrival in the United States, the M/T Nairi unloaded about 44% of the gasoline in Portland, Oregon. The relevant entry documents were completed allegedly by Golden Gate Petroleum Int'l's broker, Livingston International, Inc. *Aff. O'Keefe* ¶ 12. "Golden Gate Petroleum" was identified as the importer of record on the Customs Form 7501 (Entry Summary) and as the "purchaser" on the Pro Forma Invoice. *Aff. O'Keefe*, Ex. 13. The Government liquidated the Portland entry as "motor fuel" under item 475.25, TSUS, the same tariff classification under which Golden Gate Petroleum had entered the product.

The M/T Nairi then transported the remaining gasoline, 5,235,720 gallons, and all of the toluene to San Francisco. *Aff. O'Keefe* ¶ 13. The Customs Form 7501 for the San Francisco entry again identified "Golden Gate Petroleum" as the importer of record and listed Golden Gate Petroleum's importer number and bond number on the entry summary. The form was prepared and signed by another broker, Thornley & Pitt. The San Francisco Form 7501 contained one apparent error: while the quantity of the merchandise unloaded in San Francisco was correct, the listed "entered value" of $ 4,966,885 was not correct because the amount reflected the value of the entire shipment instead of the value of the portion unloaded in San Francisco, which was $ 2,991,997. Apparently, the overstated value of the San Francisco entry had no immediate effect on Golden Gate Petroleum's classification and initial deposit of duties under item 475.25, TSUS, a specific tariff applied to the quantity entered. Golden Gate Petroleum deposited estimated duties worth $ 130,893.00 on the leaded gasoline portion of the entry. Customs, however, liquidated the San Francisco entry under item 432.10, TSUS, as "a mixture in whole or

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[1] Golden Gate Petroleum Int'l is no longer in business.

[2] Dennis M. O'Keefe is President of Golden Gate Petroleum Co. and was President of Golden Gate Petroleum International, Ltd. He executed his affidavit on July 21, 2005.

in part of hydrocarbons derived in whole or in part from petroleum." *Aff. O'Keefe* ¶ 20. This reclassification resulted in a column 2 tariff rate of 30 percent *ad valorem*, a higher rate than as entered, and Customs applied the 30 percent to the incorrect "entered value" of $ 4,966,885, assessing additional duties of $ 1,359,172.50. *Aff. O'Keefe* ¶ 20. On May 30, 1986, Customs billed Golden Gate Petroleum's surety, Fireman's Fund Insurance Company, and the surety paid the liability limit of $ 200,000.00 under that bond.

Golden Gate Petroleum timely protested this change in classification and liquidation. The protest named "Golden Gate Petroleum Company, Inc." as the importer. The protest was made against Customs' classification of the merchandise in item 432.10, TSUS, claiming that it was properly classifiable under item 475.25, TSUS, or alternatively under 475.35, TSUS, and did not challenge any other aspects of Customs' liquidation. It did not claim that the incorrect importer was listed on the entry documents, nor did it note the incorrect value used to appraise the entry and increase the amount of duty. Four years after the protest was filed, Customs denied the protest. Golden Gate Petroleum did not challenge that denial in this Court. It now claims that it did not have funds to pay the $ 1,359,172 in additional assessed duties, plus accrued interest at that time of $ 774,135, to meet the jurisdictional prerequisite for the filing of such a suit under 28. U.S.C. § 2636(a).

Since the entries were liquidated, Customs has unsuccessfully attempted to collect the additional duty and accrued interest. As a result of Golden Gate's failure to pay, the Government commenced this action pursuant to 28 U.S.C. § 1582(3).[3]

DISCUSSION

The court has exclusive jurisdiction over this case pursuant to 28 U.S.C. § 1582(3) (2004). Summary judgment is appropriate when "there is no *genuine* issue as to any *material* fact." USCIT R. 56(c) (emphasis added); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). On summary judgment motion, the court "shall

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[3] On July 8, 1991, Customs commenced an administrative penalty proceeding against Golden Gate Petroleum under 19 U.S.C. § 1592 concerning the Portland entry. *Aff. O'Keefe* ¶ 22. The pre-penalty notice claimed that Golden Gate Petroleum had been "grossly negligent" in classifying the gasoline from Russia as "motor fuel" under 475.25, TSUS. *Aff. O'Keefe* ¶ 22. It further stated that Customs would seek over $ 2.7 million in additional duties and penalties. *Aff. O'Keefe* ¶ 22. Golden Gate Petroleum objected administratively to the pre-penalty notice. *Aff. O'Keefe* ¶ 23. Customs then issued a notice of penalty lowering the level of culpability, alleging that Golden Gate Petroleum had "negligently" classified the gasoline on the Portland entry, and demanding a penalty and additional duties of over $ 1.6 million. Customs agreed to stay the administrative aspect of the penalty proceeding, contingent on Golden Gate Petroleum's agreement to extend the statute of limitations for Customs to bring a court action to impose a penalty until November 22, 2004. *Aff. O'Keefe* ¶ 24. It appears that the waiver on the statute of limitations has run, and the Government has not filed a penalty action on the Portland entry in this Court. *Def.'s Opp. Br.* 8.

if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." *See* USCIT R. 56(d). If no genuine issue of material fact exists, the court determines whether either party "is entitled to a judgment as a matter of law." USCIT R. 56(c). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

1. The Importer's Identity for the Entry at Issue

In this action, the Government seeks to recover unpaid duties claiming that Defendant, as the importer of record, is liable for payment of estimated duties and accrued interest pursuant to 19 U.S.C. § 1505.[4] "The identity of the importer is a material fact for determining duty liability." *Henry Mast Greenhouses, Inc. v. United States*, 19 CIT 1414, 1416, 966 F. Supp. 1226, 1229 (1995). The Government bears the burden of establishing that Defendant is the importer for purposes of duty liability. *See* 28 U.S.C. § 2639[5]; *Henry Mast Greenhouses*, 19 CIT at 1417 n.6, (citing *United States v. Bishop*, 125 F. 181 (8th Cir. 1903)).

Reading the facts of this case with the governing substantive law establishes that the Government has met its burden of showing that Plaintiff was the importer for purposes of duty liability. Customs' regulations define "importer" as

> . . . the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf. The importer may be:
>
> (1) The consignee, or

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[4] At the time of the entry, section 1505 provided in relevant part:

(a) Deposit of estimated duties and fees
Unless merchandise is entered for warehouse or transportation, or under bond, the *importer of record* shall deposit with the appropriate customs officer at the time of making entry . . . the amount of duties estimated by such customs officer to be payable thereon.
(b) Collection or refund
The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation.

19 U.S.C. § 1505 (1982 & Supp. V 1987) (emphasis added).

[5] 28 U.S.C. § 2639 (2000) provides for the burden of proof:

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

(2) The provisions of paragraph (1) of this subsection shall not apply to any civil action commenced in the Court of International Trade under section 1582 of this title.

> (2) The *importer of record*, or
>
> (3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
>
> (4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with subpart C of part 144 of this chapter.

19 C.F.R. § 101.1 (emphasis added). The statute provides that the "importer of record" is liable
for estimated duties. 19 U.S.C. § 1505(a). In addition, pursuant to 19 U.S.C. § 1484(a)(2)(B), "the required documentation or information shall be filed or electronically transmitted either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under section 1641 of this title." In this case, the entry documents for the San Francisco entry were completed by Golden Gate Petroleum's broker. The official entry documents state that Defendant was the "importer of record" for the San Francisco entry. Specifically, "Golden Gate Petroleum" was designated as the importer of record on Form 7501 and its importer identification number was listed on Form 7501. In addition, Golden Gate Petroleum was the principal on the bond, its importer number appears on the bond, and it is named on the pro forma invoice for the merchandise at issue. Notably, Golden Gate Petroleum's surety, Fireman's Fund Insurance Company, has paid the limit of liability under that bond for the increase in duties on the San Francisco entry.

Nevertheless, Defendant argues that the importer of record in this case is Golden Gate Petroleum Int'l and that the broker made a mistake by using Golden Gate Petroleum's identification number. The court cannot accept this argument as the entry documents state unambiguously that the importer of record is "Golden Gate Petroleum." In addition, at the time, Customs' computer system contained no record of an importer by the name of "Golden Gate Petroleum International, Ltd." or of a bond issued to that entity. *See Letter from Customs*, Apr. 10, 1996. Meanwhile, Customs requires that

> Each person, business firm, Government agency, or other organization shall file Customs Form 5106, Notification of Importer's Number or Application for Importer's Number, or Notice of Change of Name or Address, with the first formal entry which is submitted or the first request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection.

19 C.F.R. § 24.5(a) (1985).

Further supporting the Government's satisfaction of its burden, Golden Gate Petroleum was the party that protested Customs' liqui-

dation of the San Francisco entry. The protest was filed by "Golden Gate Petroleum," using its importer identification number and relevant entry document number. Tellingly, in the accompanying Memorandum in Support of Protest and Application for Further Review, Golden Gate Petroleum wrote "On October 7, 1995, Golden Gate Petroleum Company, Inc. . . . imported into San Francisco a cargo of petroleum products aboard the vessel M/T 'Narai' [sic]." *Pl.'s* Ex. B. *See Prestigeline v. United States*, 75 Cust. Ct. 139, 143, 406 F. Supp. 532, 535 (1975) (finding that "the true identity of the protesting party and plaintiff in [a classification action] is readily ascertainable from the importer's identifying number appearing on the protests" that has to be furnished under 19 C.F.R. §§ 24.5 and 174.13(a)(2)).

Plaintiff has not presented any evidence undermining the validity of the entry documents and the protest filed for the San Francisco entry. Instead, Defendant argues that the Government's claim is unlawful and should be dismissed because Golden Gate Petroleum Int'l was the sole owner, shipper and importer of the gasoline. Defendant insists that the court look at the underlying transaction to establish that Golden Gate Petroleum Int'l was the "actual" importer. In support of its position, Defendant cites to dicta in *United States v. Cherry Hill Textiles, Inc.*, where the Federal Circuit stated that "if a liquidation were obtained through unimpeachable procedures and stated the correct duty, it would not result in the imposition of liability on a person who had nothing whatsoever to do with the entry but was mistakenly identified as the importer or surety." 112 F.3d 1550, 1560 (Fed. Cir. 1997). While Golden Gate Petroleum has shown that Golden Gate Petroleum Int'l negotiated and signed a contract for the purchase of the gasoline from Nichimen, and also arranged for its transportation, Defendant did not demonstrate that Golden Gate Petroleum was mistakenly identified as the importer by the broker. The entry documents and the filed protest show that Golden Gate Petroleum acted as the importer for the San Francisco entry. *See Henry Mast Greenhouses*, 19 CIT at 1417 (noting that the name on the official documents was the telling evidence of the importer's identity). The court takes these official documents at their face value and finds that under the governing law, Defendant has been conclusively identified as the importer for purposes of duty liability in this case.

2. Assessment of Duties

Defendant in this action also seeks to challenge the validity of duties sought by the Government by arguing that the amount used to assess the duty was erroneous. Specifically, Defendant argues that the Government is attempting to collect duties on the merchandise that it knows was never imported at the Port of San Francisco and that, therefore, the liquidation is void *ab initio*. The Government

counters that 19 U.S.C. § 1514(a) makes Customs' liquidation final on all persons unless protested and unless a civil action contesting the denial of the protest is commenced in the U.S. Court of International Trade.

In this case, Golden Gate Petroleum's broker mistakenly listed the entered value of the cargo as $ 4,966,885.00 rather than $ 2,991,997.00. The Portland entry documents showed that Golden Gate Petroleum paid the estimated duties on the portion of cargo whose value was then included on the San Francisco Customs Form 7501, and Customs liquidated that entry without any change in classification. Golden Gate Petroleum asserts that "this error should have been apparent to both the Government and the broker from the documents already in their possession." *See Aff. O'Keefe* ¶ 15. Defendant claims that the Government's case thus "includes the liquidation of 4,233,802 gallons of gasoline in San Francisco that were, in fact, imported through Portland, where duties on it were paid and liquidated." *Def.'s Opp'n Br.* 6. In support, Defendant cites to the following Customs' regulation[6]:

> When any merchandise not corresponding with the description given in the invoice is found by the examining officer, duties shall be assessed on the merchandise actually found. If the discrepancy appears conclusively to be the result of a mistake and not of any intent to defraud, no proceedings for forfeiture shall be taken.

19 C.F.R. § 152.3. This regulation was promulgated in connection with 19 U.S.C. § 1499, laying out requirements for Customs' inspection, examination, and appraisal of merchandise at entry. Congress has given Customs the authority to "fix the final appraisement of merchandise by ascertaining or estimating the value . . . by all reasonable ways and means in [Customs'] power." 19 U.S.C. § 1500(a).

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[6] The court notes that the cases cited by Defendant are inapposite and even adverse. *See Ashland Chem. Co. v. United States*, 7 CIT 362 (1984) (holding that Customs' appraisement of merchandise based on the unsupported addition of twenty percent to an invoice price was erroneous); *United States v. Woodward-Newhouse Co.*, 11 Ct. Cust. 284 (1922) (holding that where the entry stated correctly the number of bushels and the price per bushel, but erroneously extended the total value, "the entered value" for purposes of appraisement was the unit value and not the erroneous extension, and that it was the duty of the collector to multiply the number of bushels by the value per bushel and assess duty on the result); *United States v. Muller, Maclean & Co.*, 158 F. 405, 406 (1907) (holding, *inter alia*, that the Customs Administrative Act of 1890, requiring that duty not be assessed on less than the invoice value, "does not require the collector to accept a mistaken value given in a pro forma invoice, when he has before him the correct value given in a consular invoice."). Notably, in *Woodward-Newhouse*, the importer protested Customs' liquidation specifically pointing out that the value of the importation was a manifest clerical error. 11 Ct. Cust. at 285. Similarly, in *Muller*, the importer was appealing a decision of the Board of General Appraisers, a predecessor to this Court, with jurisdiction over protests. 158 F. at 406. These cases would have been relevant if Defendant availed itself of the administrative remedies under section 1514 or 1520(c).

While Customs is responsible for appraising merchandise, the pertinent statute at the time provided:

> . . . decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to–
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> . . .
>
> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> . . .
>
> *shall be final and conclusive* upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a) (1982 & Supp. V. 1987) (emphasis added). At the time, the law also provided that any "clerical error" could be brought to Customs' attention within one year after the date of entry for reliquidation. *See* 19 U.S.C. § 1520(c)[7] (1982 & Supp. V. 1987), *repealed by* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, § 2105, 118 Stat. 2434 (2004).

The value error now challenged before the court was undoubtedly a protestable issue, and, alternatively, the importer could have also pursued relief through 19 U.S.C. § 1520(c). In its protest, however, Golden Gate Petroleum did not challenge the value error.[8] Nor did

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[7] Section 1520(c) provided:

(c) Reliquidation of entry or reconciliation

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—

(1) *a clerical error*, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction; or

(2) any assessment of duty on household or personal effects in respect of which an application for refund has been filed, with such employee as the Secretary of the Treasury shall designate, within one year after the date of entry.

[8] In its motion for summary judgment, Golden Gate also challenged Customs' reclassification of the merchandise in the San Francisco entry under item 432.10, TSUS. For the

Defendant commence a timely action in this Court to perfect jurisdiction over its challenge. *See, e.g., United States v. T.J. Manalo, Inc.*, 26 CIT 1117, 1122, 240 F. Supp. 2d 1255, 1259–60 (2002) (stating that to challenge a denied protest in this Court, the importer must file a civil action within 180 days after the date of mailing of notice of denials of a protest, 28 U.S.C. § 2636(a)(1), and pay the outstanding duties and interest before the action is commenced pursuant to 28 U.S.C. § 2637(a)). Defendant's argument that the liquidation of the San Francisco entry was void *ab initio* is without merit because the liquidation was not illegal in this case: Customs' incorrect appraisement was a result of incorrect information provided by the importer on the entry documents. *Cf. Cherry Hill Textiles*, 112 F.3d at 1560 (holding, *inter alia*, that "[r]egardless of the accuracy or procedural correctness of the new liquidation, it would have no legal effect, because it would be barred by principles of res judicata" after a deemed liquidation has become final). The result is unfortunate, but the law is unbending in this case as Defendant failed to challenge the liquidation based on a procedural or factual error in its protest or otherwise. The Federal Circuit has interpreted section 1514 as precluding the remedy sought by Defendant in this case:

> The issue of the effect of the "final and conclusive" clause is thus simply one of statutory construction. The language of section 1514, that a liquidation will be "final and conclusive" unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit. Moreover, we discern no compelling policy consideration counseling against giving the statutory language its naturally broad reading. To the contrary, under [the surety's] position importers or sureties could bypass the protest mechanism in any case in which an underpayment of duties is alleged, and then collaterally challenge the liquidation in the ensuing enforcement action. To give importers and sureties that option would create a gaping hole in the administrative exhaustion requirement of section 1514 and would be inconsistent with the underlying policy of section 1514, which is to channel challenges to liquidations through the protest mechanism in the first instance.

Id. at 1557 (internal citations omitted). The Federal Circuit's interpretation of section 1514 requires that the court uphold the protest requirement as applicable to this recovery of duties case. Because it did not protest the issue, Defendant does not have a cause of action before this court to correct the error in its entry documents.

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same reasons, the court lacks jurisdiction to consider this issue as Golden Gate did not protest Customs' denial of its protest.

CONCLUSION

The Government in this case is entitled to summary judgment as a matter of law and Defendant is found liable for duties in the amount of $ 1,359,172.50. Regarding the Government's prayer for prejudgment interest from the fifteenth day after the entry's liquidation until the date of entry of judgment, presently the court is not inclined to order Golden Gate Petroleum to pay such interest. *See United States v. Goodman*, 6 CIT 132, 140, 572 F. Supp. 1284, 1289 (1983) ("In the absence of a statutory provision to the contrary, an award of prejudgment interest is a matter left to the sound discretion of the trial court, is governed by consideration of equity and fairness, and is awarded to make the wronged party whole."). Instead, the court orders the parties to consult, negotiate, and agree upon the amount of prejudgment interest and to inform the court of such an agreement as directed in the accompanying order. The parties will calculate prejudgment interest on the basis of the rate provided in 28 U.S.C. § 2644 and in accordance with 26 U.S.C. § 6621. *See Goodman*, 6 CIT at 140. Finally, the Government is awarded post-judgment interest for the same equitable reasons[9] at the rate provided by 28 U.S.C. § 1961.

SLIP OP. 06–23

NIPPON STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and U.S. STEEL GROUP, A Unit of USX Corporation, ISPAT INLAND INC., GALLATIN STEEL, IPSCO STEEL, INC., STEEL DYNAMICS, INC., and WEIRTON STEEL CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani,
Chief Judge
Consol. Court No. 99–08–00466

JUDGMENT

Upon consideration of the Final Results of Redetermination Pursuant to Court Remand filed by the United States Department of

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[9] It should be noted that although this Court has awarded post-judgment interest citing to 28 U.S.C. § 1961, *see, e.g., Rico Imp. Co. v. United States*, 17 CIT 183, 184(1993), this section on its own terms applies to money judgments in civil cases recovered in district courts and therefore does not apply to this Court. *See* 28 U.S.C. § 1961(b)(4) ("This section shall not be construed to affect the interest on any judgment of any court not specified in this section."). While this court is not a "district court," it "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585; *see, e.g., United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996) (distinguishing this Court from district courts, citing 28 U.S.C. § 1585.). For the reasons stated in *Goodman*, the court finds the rate of interest specified in 28 U.S.C. § 1961 applicable in this case. *Goodman*, 6 CIT at 140–41.

Commerce in the above-captioned action on December 2, 2003, all other papers and proceedings herein, and the lack of comment thereon, it is hereby,

ORDERED that the Final Results of Redetermination Pursuant to Court Remand are affirmed in all respects.

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